Mohamed bin Abid v Sri Sutera Sdn Bhd & Anor (Khalid bin Din, Third Party)

HIGH COURT (KUALA LUMPUR) — SUIT NO S2-22-170 OF 1993
KAMALANATHAN RATNAM J
17 MARCH 1999

Contract *— Claim for moneys owing — Failure to pay profits from sale of cars — Whether arrangement for sale of foreign cars in local market was agreed upon by parties — Whether case proved*

The plaintiff contended that he met with the second defendant in his office, during which meeting, the second defendant had represented that he was able to purchase used cars from the UK to be imported into Malaysia and resold locally for a profit. The plaintiff further contended that the second defendant represented that he was a director of the first defendant. Instructions were given by the plaintiff to purchase five cars. Once the cars had arrived in Malaysia, the first defendant took possession of two cars. The plaintiff contended that the defendants had since failed to pay the plaintiff half the profits from the sale of the two cars. The plaintiff also claimed possession of the remaining three cars which the first defendant took possession on the understanding and agreement that these cars would subsequently be given to the plaintiff and which the defendants had since failed to do. A letter from the managing director of the first defendant ('CABD 74') was put in by consent of all parties. The letter specifically identified the five cars and confirmed that the five cars were shipped on behalf of the plaintiff who was the rightful owner.

Held, allowing the claims:

(1) Having seen and heard the witnesses, the court found that the plaintiff was a witness of truth. The court found the evidence of the plaintiff with regard to the meeting between him and the second defendant as true. On this basis alone, the court ought to find for the plaintiff (see p 710F–H).

(2) CABD 74 was one telling piece of documentary evidence that buried the defendants' case. The court rejected the defendant's evidence that he did not understand the contents of CABD 74. In any case, this document was put into the CABD without any challenge and pursuant to the court's direction during case management, the contents must be deemed to be agreed and admitted. Notwithstanding the same, it was incumbent upon the defendant pursuant to s 103 of the Evidence Act 1950 to prove the basis of his contention. The court found that the defendants failed to satisfy the court upon the basis of s 103 that CABD 74 ought to be rejected (see pp 712C–713G).

[Bahasa Malaysia summary

Plaintif menegaskan bahawa beliau telah berjumpa dengan defendan kedua di pejabatnya di mana dalam pertemuan tersebut, defendan kedua telah merepresentasikan bahawa beliau boleh membeli kereta-kereta terpakai dari UK untuk diimport ke Malaysia dan dijual di sini untuk keuntungan. Selanjutnya, plaintif menegaskan bahawa defendan kedua telah merepresentasikan bahawa beliau adalah pengarah kepada defendan pertama. Arahan-arahan telah diberikan oleh plaintif untuk membeli lima buah kereta. Sejurus selepas kereta-kereta tersebut tiba di Malaysia, defendan pertama telah mengambil milikan dua buah kereta. Plaintif menegaskan bahawa defendan-defendan sejak masa itu telah gagal membayar plaintif separuh daripada keuntungan daripada penjualan dua kereta tersebut. Plaintif juga telah menuntut milikan untuk baki tiga kereta yang lain di mana defendan pertama telah mengambil milikan atas persefahaman dan perjanjian bahawa kereta-kereta tersebut akan diberikan kepada plaintif kemudian dan di mana plaintif telah gagal berbuat demikian. Sepucuk surat daripada pengarah urusan defendan pertama ('CABD 74') telah dikemukakan dengan kebenaran semua pihak-pihak. Surat tersebut dengan spesifik mengenal pasti lima buah kereta tersebut dan mengesahkan bahawa kelima-lima buah kereta tersebut telah dihantar dengan kapal bagi pihak plaintif yang merupakan pemunya yang sah.

Diputuskan, membenarkan tuntutan tersebut:

(1) Selepas melihat dan mendengar saksi-saksi, mahkamah mendapati bahawa plaintif adalah seorang saksi yang jujur. Mahkamah mendapati bahawa keterangan plaintif berkenaan dengan pertemuan di antara beliau dengan plaintif kedua adalah benar. Atas dasar ini sahaja, mahkamah patut memihak kepada plaintif (lihat ms 710F–H).

(2) CABD 74 merupakan suatu keterangan dokumentari yang menutup kes defendan. Mahkamah telah menolak keterangan defendan bahawa beliau tidak faham kandungan CABD 74. Dokumen ini telah dimasukkan ke dalam CABD tanpa apa-apa bantahan dan menurut arahan mahkamah semasa urusan kes, kandungan tersebut mestilah dianggap telah dipersetujui dan diakui. Adalah perlu bagi defendan menurut s 103 Akta Keterangan 1950 untuk membuktikan dasar bagi penegasannya. Mahkamah mendapati bahawa defendan-defendan telah gagal untuk memuaskan mahkamah atas dasar s 103 bahawa CABD 74 patut ditolak (lihat ms 712C–713G).

Notes

For a case on claim for moneys owing, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) para 1831.

Cases referred to

KGN Jaya Sdn Bhd v *Pan Reliance Sdn Bhd* [1996] 1 MLJ 233 (refd)

Legislation referred to

Evidence Act 1950 s 103

Azlan Sulaiman (*Ghazi & Lim*) for the plaintiff.
S Murthi (*Kharida Ramli* with him) (*Samat Din & Partners*) for the first defendant.
Abdul Khalid Shah (*Khalid Shah & Co*) for the second defendant.

Cur Adv Vult

Kamalanathan Ratnam J:

Case for the plaintiff

The plaintiff's claim against the defendants is based on the following:

(1) The plaintiff met with the second defendant in the plaintiff's office in mid-1992 during which meeting the second defendant had represented that he was able to purchase used Mercedes Benz cars from the UK to be imported into Malaysia and re-sold locally for a profit.

(2) The second defendant represented that he was a director of the first defendant and would be using the first defendant's approval permits ('APs') to import the cars into Malaysia.

(3) It was agreed between the plaintiff and the defendants that the second defendant would source for the cars in the UK and, after notifying the plaintiff as to what cars had been sourced, the plaintiff would then issue instructions to the second defendant to purchase them.

(4) To facilitate the purchase of the cars it was agreed that the plaintiff would send the money to purchase the cars to the second defendant who would do the actual purchasing.

(5) Prior to shipping the cars to Malaysia, the second defendant would show the cars to the plaintiff's son in London who would inspect the cars.

(6) The second defendant would then arrange to ship the cars to Malaysia.

(7) Once the cars had arrived in Malaysia, the first defendant would cause the cars to be sold and the plaintiff and first defendant would then share the profits from the sale of the cars after first deducting the sums which the plaintiff had advanced for their purchase.

(8) Instructions were given by the plaintiff in August/September 1992 and then in October 1992 to purchase five cars in all, with the plaintiff giving a total of BP87,100 to the second defendant to purchase them.

(9) All five cars were subsequently shipped from Felixstowe, England, to Port Klang with the defendants named as consignee of the shipment, in all five of the related bills of lading.

(10) In October 1992 the first defendant took possession of two of the cars which arrived in the first shipment and subsequently paid the plaintiff the sum of BP31,500 to account for the price of the cars.

The plaintiff contends that the defendants have since failed to pay the plaintiff half the profits from the sale of the said two cars. The plaintiff also claims possession of the remaining three cars which the first defendant took possession of in January 1993 on the understanding and agreement that these cars would subsequently be given to the plaintiff and which the defendants have since failed to do.

Case for the defendants

The first defendant denied that the second defendant was its director or agent at any time and that therefore the second defendant was not possessed of any authority to contract on behalf of the first defendant. It was also the case of the first defendant that both the defendants had entered into their own arrangement whereby the first defendant had agreed to purchase used Mercedes Benz cars from the second defendant and that for this purchase the first defendant had, on 8 September 1992, given the second defendant a sum of RM250,000 as deposit for the purchase of 6 – 8 such cars. It was also its case that the second defendant had sold six such cars to the plaintiff and that in any case the first defendant had paid for these cars in full. The first defendant contended that the five cars claimed by the plaintiff were in fact amongst the six already sold to the plaintiff.

Findings of the court

Having seen and heard the witnesses I have absolutely no hesitation in finding that the plaintiff is a witness of truth. He was clear, cogent and fluid with his evidence. There was no prevarication nor hesitancy, unlike the second defendant. But I shall deal with the second defendant's evidence later. I accept the plaintiff's evidence that the second defendant did indeed meet with him at his office and reached the agreement. In fact under cross-examination the second defendant admitted that he had indeed gone to meet the plaintiff at the latter's place but gave no plausible or acceptable reason for doing so nor did he challenge the plaintiff's version. In the circumstances I find that the evidence of the plaintiff with regard to the meeting between him and the second defendant as true. On this basis alone I ought to find for the plaintiff.

Further, the evidence of PW2 also inspired confidence with regard to the plaintiff's case. PW2 is the son of the plaintiff and who was at the material time studying in England. He confirmed that on 31 August 1992 he gave the second defendant a sum of BP18,000 to buy a Mercedes Benz MB 300SE (1989) model and that in early September the second defendant

showed him this car. This car was included in the bill of lading in respect of its shipment to Malaysia. In fact the evidence of PW2 that the second defendant had also asked for an additional sum of BP1,100 and which he had indeed paid, was not challenged. Again I find PW2 as an honest and truthful witness. I have no reason to doubt his evidence. The bill of lading, UK vehicle registration document and the Malaysian Customs declaration form, enclosed in the common agreed bundle of documents ('CABD'), all refer to this same vehicle. It must also be noted that the second defendant gave to the plaintiff a copy of the same bill of lading when the plaintiff requested for same.

In respect of Mercedes Benz MB 260E (1989) model I also accept PW2's evidence that he gave the second defendant a sum of BP15,500 on 7 September 1992 to buy the said car and that a few days later the second defendant showed him a grey Mercedes Benz 260E (1989) model. Again the bill of lading, registration card and the AP permit enclosed in the CABD refer to a grey Mercedes Benz 260E (1989) model. In fact there is again unchallenged evidence from the plaintiff that when he requested for this bill of lading, the second defendant gave him the same copy as found in the CABD.

In respect of the other three cars, namely, 260E (1990) model, 230E (1989) model and 260D (1990) model, the invoices in the CABD show that these three cars were purchased between 23 October 1992 and 27 October 1992 for a total sum of BP43,400. Both PW1 and PW2 testified that on 6 October 1992 and on 22 October 1992, PW2 had given to the second defendant a total sum of BP52,500 which would have been more than sufficient to cover the purchase price of these three cars and to pay for the freight charges. I find again both witnesses' testimony consistent with the bills of lading showing cars of similar make and description. What is even more convincing is that PW2 testified that he managed to procure a copy of these bills from the shipping agent and that he had faxed them to his father, the plaintiff. It is no coincidence that each bill identifies the defendants to be the consignees of the cargo stated therein.

The second defendant denies having received the money from the plaintiff to buy these cars but he offers contradictory versions as explanation. On the one hand the second defendant claims that he purchased the cars with his own money and on the other hand he alleges that the first defendant gave him RM250,000 as deposit to buy the cars and subsequently gave him the balance. The second defendant in any case adduced no evidence to explain how he was able to make such a purchase on his own.

I find that the bills of lading for the five cars which the plaintiff claims and which are agreed and admitted documents, have both the defendants as consignees of the cars, thus entitling them and them only, or their agents to take possession of the said cars from the port or customs authorities upon presentation of the original bills of lading. It is also common ground that the defendants were in fact in possession of the original bills of lading in respect of the said five cars.

DW1, the managing director of the first defendant, admitted in his examination-in-chief that he took possession of two of the said cars on 14 October 1992 and that they were sold soon thereafter. Subsequently, the other three cars arrived in Port Klang on 25 November 1992. DW2, the managing director of a forwarding agency, confirmed that he had on 21 January 1993 taken possession of the said three cars and had delivered them to the first defendant and DW1 confirmed that the said three cars were also sold subsequently.

I therefore have no hesitation in finding as a fact that the first defendant came into possession of the said five cars claimed by the plaintiff and had sold all five cars and had received the proceeds of sale. The defendants had not adduced any evidence as to what price these cars were sold at.

One telling piece of documentary evidence that buries the defendants' case is a letter marked CABD 74 put in by consent of all parties into the CABD. During case management I had clearly directed parties that if any document was to be disputed or not agreed to, notice of such objection must be given to the party intending to admit that document into evidence with a copy of such letter to the court, so that on the next case management date, I could decide whether the said document need to be proved or not. It was also my directive that any document in the CABD not challenged of its contents or its authenticity would be deemed agreed and admitted. This document (CABD 74) was a letter from DW1, the managing director of the first defendant, wherein he specifically identified the five cars through their registration numbers and bills of lading and confirmed that the said five cars were 'shipped from Felixstowe to Port Klang on behalf of Encik Mohamed bin Abid (I/C No 1562277) who is the rightful owner'. The document further confirmed that 'All proceeds of sale on the abovementioned cars are to be paid to Encik Mohamed bin Abid and ownership of cars unsold is to be handed to him as rightful owner.' In any case referring to this document, PW1 testified that DW1 not only read it thoroughly but that he, PW1 also explained the contents to DW1. Whilst not challenging its authenticity, nor whilst not disputing its contents, DW1 challenged the voluntariness of the said statement. DW1 contended that he did not understand the contents of the said letter because he is not proficient in the English language. He further contended that the plaintiff had misrepresented to him the contents of the said letter in that the plaintiff had said that the letter was merely for the first defendant to acknowledge having received the cars from the second defendant because he the plaintiff needed the said letter to make a claim against the second defendant. He also contended that the plaintiff had threatened that if he, DW1, did not sign the letter, the plaintiff would have the cars detained at the port. DW1 maintained that soon after he had signed CABD 74 he referred it to his brother who then explained the true contents to him. It is interesting to note that DW1 lodged a police report in respect of CABD 74 on 10 February 1993. However, in that report he said he signed CABD 74 without ascertaining if the plaintiff was the actual owner, and in good faith, and whilst trusting the plaintiff as he was a friend of the second defendant. However, upon receipt of documents which showed that the owner of the said vehicles was the second defendant he realized that he

had been cheated by the plaintiff. Now to my mind this report is a far cry from the explanation given by DW1 in court. He did not at all mention in the police report that he did not understand the English language. Nor did he in court, rely on the explanation given in the police report. In the circumstances his explanation with regard to CABD 74 cannot be relied upon. It is difficult to accept DW1's evidence on this. Surely upon his discovery of such a heinous misrepresentation, I would have thought that he would have given the correct version in the police report and would have also instructed his solicitors to retract the said letter.

What is even more perplexing with regard to the defendants' case is the existence of two other documents, namely, CABD 52 and 53. CABD 52 is a payment voucher of the first defendant dated 8 September 1992 authorizing payment to the second defendant a sum of RM250,000 as deposit for Mercedes Benz motor cars. CABD 53 is a note from DW1 also dated 8 September 1992 confirming that he was paying cash RM250,000 to the second defendant as deposit towards the purchase of six Mercedes Benz cars and that the balance would be paid to the second defendant when all the cars had arrived in Malaysia. If the contents of these two documents are intended to speak for themselves and if they are true of their contents, then I see no reason why DW1 had signed CABD 74 nor allow himself to be subjected to threats by the plaintiff. The defendants' case rings as hollow as the stump of a rotten tree. In any case watching the demeanour of the plaintiff, DW1 and the second defendant, the plaintiff stands out as the credible witness.

I reject DW1's evidence that he did not understand the contents of CABD 74. In any case this document was put into the CABD without any challenge and pursuant to my directions, the contents must be deemed to be agreed and admitted. Notwithstanding the same it is incumbent upon DW1, pursuant to s 103 of the Evidence Act 1950 to prove the basis of his contention. The said section reads as follows:

> The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

It is my finding that neither has DW1 nor have the defendants satisfied me, upon the basis of s 103, that the said document CABD 74 ought to be rejected.

In considering the defendants' case that the first defendant had indeed paid a sum of RM250,000 to the second defendant as deposit, I find that this very important issue has not even been pleaded. Surely if that was the case, the defendants would have instructed solicitors to plead this fact. It is trite law that material facts must be pleaded. There was no application even at the trial stage, to amend. In the circumstances, I reject all evidence relating to the purported payment of RM250,000 by the first defendant to the second defendant.

Since I had said I would deal with the second defendant's evidence later, it is now appropriate and opportune to do so. The plaintiff had

testified that at the meeting on 29 December 1992 in the plaintiff's then solicitors' office in Kuala Lumpur an agreement was reached that the plaintiff was to be paid BP31,500 as representing the purchase of Mercedes Benz 300 SE (1989) model and Mercedes Benz 260E (1989) model and that the plaintiff was also to receive half of the proceeds of sale of the cars. The second defendant testified that it was he who had suggested that the sum of BP31,500 be paid by the first defendant to the plaintiff. DW1 also testified that he was assured by the second defendant that this sum of BP31,500 was to be regarded as being part payment for the cars. This is where I find that the second defendant has not been honest with the court. If the second defendant did not receive any money whatsoever from the plaintiff, as he contended, then why was there a need to pay any money at all to the plaintiff.

Authority of the second defendant to bind the first defendant

It is my finding that the second defendant had actual or ostensible authority from the first defendant to contract with the plaintiff as in the oral agreement between them held in the plaintiff's office in mid-1992 and thereby to bind the first defendant. The plaintiff had testified that from the onset the second defendant had informed him that he was a director of the first defendant. PW4, a family friend of the plaintiff, testified that he was introduced to the second defendant by the plaintiff since PW4's friend, one Tengku Faisal, was very keen to purchase a BMW 3251 SE Coupe. Both he and the said Tengku Faizal met with the second defendant at the Shangri-La Hotel. He had prepared a sale and purchase agreement between the first defendant and his friend Tengku Faizal for the sale and purchase of a BMW 3251 SE Coupe at an agreed price of RM180,000. The said agreement which was an agreed and admitted document was also included in the CABD. The second defendant has clearly signed the said agreement as director of the first defendant. PW4 testified that after he had asked the second defendant for his designation in the first defendant and after he was told by the first defendant that he was its director and also being furnished with his identity card number, PW4 confirmed that he wrote the word 'Director' below the second defendant's signature and also wrote down the identity card number. Again PW4 impressed me as an honest and reliable witness. In any case to date the first defendant had not lodged any police report to the effect that the second defendant had falsely represented himself as a director of the first defendant. Whether the second defendant was or was not a director of the company could easily be shown by producing Form 49, filed with the Registrar of Companies. However, DW1 conceded in cross-examination that there were certain Forms 49 not included in the CABD. This court can reasonably infer that the relevant Form 49 may not have been filed for if it was, it would have been included in the CABD. I have no hesitation in holding that the second defendant was a director of the first defendant. Even if I am wrong on this, I find as a fact from the evidence that the second defendant was an agent of the first defendant with authority to bind the company as shown by the fact that he could sign for and on behalf of the company in respect of the agreement

with Tengku Faizal. In *KGN Jaya Sdn Bhd* v *Pan Reliance Sdn Bhd* [1996] 1 MLJ 233, the court held that the appointment of an agent need not be in writing and that the existence of a relationship of principal and agent can be inferred from the circumstances of the case.

Treitel in *The Law of Contract* (1995 Ed) listed the following conditions that ought to be satisfied before apparent or ostensible authority arises, namely:

(a) There must be a representation of authority.

(b) The representation must be of fact.

(c) The representation must be that the 'agent' is authorized to act as agent.

(d) The representation must be made by the principal.

Tengku Faizal had in fact paid a deposit of RM15,000 by way of a cheque and evidence was led unchallenged that the said cheque in the name of the first defendant was given to the second defendant who banked it into the first defendant's account. This coupled with the fact that the second defendant had signed the said agreement as a director of the first defendant clearly showed the presence of all the above mentioned ingredients. In any case, the second defendant had admitted to the plaintiff that he was a director of the first defendant. In fact the plaintiff testified that when he first met DW1 concerning his claim to the cars, DW1 did not dispute the representation that the second defendant was a director of the first defendant. In fact he even signed CABD 74. In any case, I accept the evidence of the plaintiff and PW2 who testified without challenge that they believed that the second defendant was acting as the agent of the first defendant because they believed that as an individual the second defendant would not have been able to obtain more than one AP.

In the circumstances, I find that the plaintiff has proved his case against both defendants. As to damages and quantum the issues shall be dealt with by the deputy registrar. The plaintiff will have the costs of this action against both defendants. As a consequence thereof, both the defendants' counterclaim therefore stand dismissed with costs. The first defendant has already taken judgment against the third party.

Claims allowed.

Reported by Jafisah Jaafar